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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

STEVEN D. FREDERICK,
Petitioner

vs.

JOHN STEPANIK, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION
AT DALLAS, PENNSYLVANIA;
ERNIE PREATE, ATTORNEY GENERAL,
COMMONWEALTH OF PENNSYLVANIA; AND
THE DISTRICT ATTORNEY OF BERKS COUNTY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's Fifth and Sixth Amendment rights were violated when trial counsel failed to move to suppress the testimony of the chief prosecution witnesses and "jailhouse informants" at trial, both of whom acted as police agents in extracting incriminating statements from Petitioner in prison while he was the prime suspect in the subject murder and later under arrest and awaiting trial for it?

LIST OF ALL PARTIES

The parties to this habeas corpus action are: Steven D. Frederick, Petitioner herein, by and through his counsel of record, William C. Costopoulos, Esquire; and John Stepanik, Superintendent, State Correctional Institution at Dallas, Pennsylvania; Ernie Preate, Attorney General, Commonwealth of Pennsylvania, and the District Attorney of Berks County (Pennsylvania), by and through their counsel of record, Iva C. Dougherty, Assistant District Attorney, Berks County, Reading, Pennsylvania.

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REFERENCE TO OPINIONS BELOW

The only opinion delivered in this case is the report of the United States Magistrate Judge dated December 9, 1992, which was adopted as the opinion of the United States District Court and is reproduced in the Appendix beginning at page A53.

STATEMENT OF JURISDICTION

This petition for a writ of certiorari is from the judgment order of the United States Court of Appeals for the Third Circuit entered on May 5, 1994, which affirmed the District Court's denial of Petitioner's application for a writ of habeas corpus in the matter docketed to No. 93-1255.

Your Honorable Court has jurisdiction of this matter pursuant to Sections 1254(1), 1651 and 2254 of Title 28, United States Code (28 U.S.C. § 1254(1), 1651 and 2254).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment to the United States Constitution

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]"

Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

This petition for writ of certiorari to the Third Circuit arises from the denial of Mr. Frederick's application for writ of habeas corpus.

Following a trial by jury, Petitioner was convicted of first-degree murder, aggravated assault, robbery and theft in the Court of Common Pleas, Berks County, Pennsylvania on May 23, 1977. He was sentenced to life imprisonment. The charge were based on the murder of Dureme Kunkel at her home in Topton, Berks County, on February 12, 1975.

After the victim's body was discovered, Mr. Frederick was questioned repeatedly by the police, especially Pennsylvania State Police Lt. Donald Holloway beginning on

February 14, 1975. According to Holloway, Petitioner was the focus of the investigation shortly after the body was found. On March 5, 1975, Petitioner was arrested for a parole violation and incarcerated in the Berks County Prison.

On March 20, 1975, Lt. Holloway went to the Berks County Prison where he met with Arlan Schaedler for the first time in connection with this case. Lt. Holloway recalled that the meeting took place in the daylight hours because the warden was there. The first note of Mr. Schaedler, purporting to be a written memorandum of Petitioner's admissions, was dated March 20, 1975 and timed at 8:20 p.m., or after his initial meeting with Lt. Holloway.

Lt. Holloway denied, at the state Post-Conviction Relief Act (PCRA) hearing,

instructing Arlan Schaedler to obtain evidence linking Petitioner to the murder. However, the trial prosecutor represented to the trial judge, on the record in an offer of proof, that Lt. Holloway would testify that he did communicate with Schaedler on March 20, 1975 and that he provided Schaedler with questions to ask Mr. Frederick:

MR. MORRISEY:

> This witness will testify that he is a member of the Pennsylvania State Police, that on March 20th, 1975, he visited the Berks County Prison and talked to one Arlan Schaedler who advised him that he had information regarding the murder of Dureme Kunkel, and further

communicated with Schaedler concerning the murder of Dureme Kunkel and provided him questions to ask Frederick which were in fact false in nature and false leads to determine whether or not Schaedler would report the same thing back or change them, of which Mr. Schaedler did report back to him, after communicating with Mr. Frederick, was false.

Mr. Frederick presented the following written evidence of record documenting the police-agent status of Mr. Schaedler:

(a) In a memorandum written by Mr. Schaedler to Lt. Holloway dated March 22, 1975, Mr. Schaedler asked him: "What's my next move?"

(b) In a written memorandum dated

March 26, 1975, Mr. Schaedler asked Lt. Holloway: "What do you advise me to do?" and

(c) In a note dated April 3, 1975 (the day before the criminal complaint was filed against Petitioner), Mr. Schaedler asked Lt. Holloway: "What's next?".

Based in large part on the information Mr. Schaedler provided Lt. Holloway at the latter's request, Mr. Frederick was arrested and charged with the murder and other counts on April 5, 1975.

The record also includes evidence suggesting that Edward Klusewitz, the other jailhouse informant, also acted as a police agent on behalf of Lt. Holloway and testified falsely against Petitioner at trial. In April of 1975, while incarcerated at the Schuylkill County Prison, Mr.

Klusewitz was transported to the Spring Township police department in Berks County and charged with eleven burglaries:

(a) while Mr. Klusewitz was in a holding cell for two days, Lt. Holloway and another officer visited him and stated their desire for information on Petitioner;

(b) according to Mr. Klusewitz, they offered him a 6 to 36 month sentence on his pending burglary charges; and

(c) Mr. Klusewitz, the next day, was returned to the Schuylkill County Prison. Within a week, on April 5, 1975, Mr. Frederick was arrested for the murder and housed not in the Berks County Prison (the county with jurisdiction) but rather in the Schuylkill County Prison where he was placed in a cell directly opposite the cell in which Klusewitz was incarcerated. Trooper

Robert R. Sease, however, testified at the PCRA hearing that Petitioner was taken to the Schuylkill County Prison upon his arrest because Schaedler, who had provided incriminating evidence against him, was already incarcerated at the Berks County Prison. The record demonstrated that (a) Schaedler, in fact, was released from the Berks County Prison on the very day of Petitioner's arrest (April 5, 1975); and (b) Trooper Sease knew that Schaedler had been released the day Petitioner was arrested because Trooper Sease arrested Petitioner at the PSP barracks on April 5, 1975 and arranged to have Schaedler present there.

Shortly after his incarceration at Schuylkill County Prison, Lt. Holloway began receiving notes from Mr. Klusewitz containing incriminating evidence allegedly

garnered from Petitioner subsequent to his arrest. Klusewitz testified from these notes at trial. At the PCRA hearing, Mr. Klusewitz testified that most of his testimony at Petitioner's trial was false. Mr. Klusewitz also testified that Mr. Schaedler told him, in a holding cell at Petitioner's trial, that Mr. Schaedler's testimony was untruthful and was intended to secure a more lenient sentence. The Klusewitz recantation was rejected by the PCRA Court (which also rejected Schaedler's recantation even though he hadn't testified).

Five exhibits were introduced into evidence at the PCRA hearing. These exhibits were letters written by Mr. Klusewitz and sent to the Pennsylvania Attorney General's Office in 1983 and

produced from that Office's files. The letters state Mr. Klusewitz had given false testimony in several trials in Berks County, including Petitioner's, and that he had acted as a police agent in obtaining incriminating information. Their content can be summarized as follows:

(a) beginning in February 1983, years before the PCRA petitioner was filed, Klusewitz began writing to the Attorney General's Office: "In most of these cases I was told or briefed as to what to say. I know I will have to face perjury charges as a result of some of the cases."

(b) On February 24, 1983, Klusewitz sent the Attorney General's Office another letter (notarized) specifically stating that he had testified falsely in three (3) murder trials, including Petitioner's.

(c) Agent Daniel McFadden of the Attorney General's Office received a letter from Klusewitz dated March 26, 1983, in which Klusewitz outlined the recantation of his testimony at Petitioner's trial.

(d) Klusewitz provided Agent McFadden with a detailed recantation in a letter received by the Attorney General's Office in September 1983:

> I was contacted by a Lt. Holloway State Police, while I was confined at Spring Township Police Station. Lt. Holloway asked me to get some information on Steven Freddricks [sic] on a murder he was charged with. I was told by the Lt. I would get a 6 to 36 month sentence for 11 burglarys [sic] I was charged

with. They would transfer Steve to the County prison I was in so I could get this information and send it back to them through the Warden of the prison. He would make sure the State Police would receive the papers I wrote. I turned about 12 pages of information that I said Steve told me about the murder. Most of the information was false I made it up.

Steve was convicted of 2nd degree murder. His conviction resulted from my testimony and a man named Arlan Schaedler, I talked to this man Arlan he told me all his testimony was made up. Because he had a lot of charges

against him from the State Police which he was going to get dropped for his testimony against Freddricks [sic]. I talked to him while we were in the courthouse waiting for the trial on Freddricks [sic] to begin. Arlan was classified as an expert witness too. And was know [sic] to lie so he could get his charges dropped like me. As my testimony was false too.

(e) These letters, which were provided by the Attorney General's Office itself, were sent first in 1983, more than five years before Petitioner filed his PCRA petition.

At the PCRA hearing, Lt. Holloway candidly

testified that he would put Schaedler "in the same class as Klusewitz, they're both liars."

Last, Mr. Frederick has adduced evidence of his innocence of the murder based on the trial record itself. According to the Commonwealth's own evidence presented at trial, Petitioner had an alibi at the time the murder was perpetrated:

(a) Roger Kunkel, the victim's son, testified that he last spoke with his mother on the telephone at 11:10 p.m. on February 11, 1975, at which time there was no evidence of problems or distress;

(b) another Commonwealth witness, Abraham Brown, the owner of the Red Lion Inn, testified that Petitioner came into the establishment at about 11:15 p.m. or 11:20 p.m. on February 11, 1975, was "quite

happy," bought some other patrons a beer, and stayed until about 12:35 a.m. or 12:40 a.m. on February 12, 1975;

(c) according to the Commonwealth's own theory of the case, Petitioner -- in the span of 5 or 10 minutes -- broke into the victim's home, bludgeoned her some 30 times to death, seized a money box, went through the house, got into his car, and drove 5 or 6 miles to the Red Lion Inn; and

(d) the prosecutor, at trial, specifically informed the trial judge in response to his inquiry that the Commonwealth's theory of the case was that Petitioner went to the Inn after the murder.

Following a trial by jury, Mr. Frederick was convicted as charged on May 23, 1977. Timely post-trial motions were filed on May 31, 1977. Mr. Frederick filed an additional

post-trial motion raising an ineffective assistance of counsel issue on September 18, 1979. An evidentiary hearing was held on January 3, 1980. In an order and opinion issued on March 5, 1980, Judge Hess denied all the post-verdict motions, including the ineffectiveness claim. Judgment of sentence was formally imposed on June 5, 1980.

A direct appeal to the Supreme Court of Pennsylvania was filed on July 3, 1980 and was denied, per curiam, on May 27, 1983.

On December 2, 1988, by and through undersigned counsel, Mr. Frederick filed a state PCRA petition with the Court of Common Pleas, Berks County, Pennsylvania. On February 24, 1989, a supplemental PCRA petition was filed. An evidentiary hearing was held on March 6 and 7, 1989 before the Honorable Thomas J. Eshelman. The PCRA

petitions were denied on March 28, 1989 by Judge Eshelman and a supporting opinion was issued on January 1990.

Mr. Frederick then filed a timely appeal to the Superior Court of Pennsylvania on April 19, 1989, which affirmed the lower court's order on July 23, 1990, in a memorandum opinion. Petitioner timely filed a petition for allowance of appeal with the Supreme Court of Pennsylvania, which was granted on June 6, 1991. Briefs were filed and oral argument was held before the Court on January 24, 1992. On February 14, 1992, in a per curiam order, the Court affirmed the Superior Court's order; Justices Larsen and Cappy dissented. See: Commonwealth v. Frederick, 601 A.2d 807 (1992). Petitioner therefore has exhausted his state appellate remedies. See, e.g., Toulson v. Beyer, 987

F.2d 984 (3rd Cir.1993).

On or about September 10, 1992, Mr. Frederick filed an application for writ of habeas corpus under 28 U.S.C.A. 2254. On December 9, 1992, United State Magistrate Judge James R. Melinson filed a report and recommendation in which he recommended that the petition be dismissed without hearing and that there was no probable cause for appeal. Timely objections were denied by the Honorable E. Mac Troutman, United States District Senior Judge, who filed an order and opinion entered on February 16, 1993, adopting the recommendation of Magistrate Judge Melinson denying the application and refusing to grant a certificate of probable cause for appeal.

On March 15, 1993, Mr. Frederick timely filed both a notice of appeal and a request

for certificate of probable cause with the Third Circuit. By order dated October 26, 1993, the Court (Hon. Becker, Nygaard and Roth, Circuit Judges) granted the request for certificate of probable cause. After briefing, the Third Circuit affirmed the District Court's judgment in an order entered on May 5, 1994.

REASONS FOR ALLOWANCE OF WRIT

Petitioner's Fifth and Sixth Amendment rights were violated when trial counsel failed to move to suppress the testimony of the chief prosecution witnesses and "jailhouse informants" at trial, both of whom acted as police agents in extracting incriminating statements from Petitioner in prison while he was the prime suspect in the subject murder and later under arrest and awaiting trial for it.

Mr. Frederick was convicted of murder on the basis of incriminating statements extracted deliberately by two police agents while he was incarcerated. One inmate, Edward Klusewitz, elicited such admissions at the behest of the police after Petitioner had been formally charged and was awaiting

trial and the other, Arlan Schaedler, garnered his statements under police direction while he was the chief and only suspect, in custody, and on the verge of being charged. These legal conclusions are not based on the rejected recantation testimony of Klusewitz. Because Mr. Frederick's constitutional rights to counsel and against self-incrimination were abridged as a result, in contravention of this Honorable Court's precedent in this area, a writ of habeas corpus should issue.

Since 1964, in Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), this Court has held that the police may not circumvent an accused's right to counsel by engaging an agent to obtain incriminating statements deliberately from him after indictment. This was the

state of the law in 1975 at the time of Petitioner's arrest. This principle was further enunciated in United States v. Henry, 477 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), which applied the Massiah test to incriminating statements made to a jailhouse informant and concluded that the government agent "deliberately used his position to secure incriminating information from [the defendant] when counsel was not present." 65 L.Ed.2d at 115. As summarized by the Pennsylvania Supreme Court:

"The Supreme Court of the United States has held that where an individual acts under instructions as a paid informer for the government, where he presents himself as no more than a fellow inmate rather than an agent of the government, and where the

suspect is in custody and under indictment at the time of his questioning by the secret agent, the information secured by the agent must be suppressed." (citation omitted.) Commonwealth v. Berkheimer, 501 Pa. 85, 460 A.2d 233, 234 (1983). More recently, the High Court in Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), reaffirmed its ruling that once the Sixth Amendment right to counsel has attached, law enforcement authorities may not employ an undercover agent to record conversations with an accused and elicit incriminating statements. That Court said:

"The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. . . . [T]his guarantee includes the State's

affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever -- by luck or happenstance -- the State obtains incriminating statements from the accused after the right to counsel has attached. . . . However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains

incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." Id., 106 S.Ct. at 487; emphasis supplied.

In its latest pronouncement in this area, this Honorable Court in Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), held that "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." 91 L.Ed.2d at 384-385. The informant had an adjoining jail cell and merely listened to the defendant and reported to the police on his conversations with him. However, the Kuhlmann Court reaffirmed Massiah and noted that "the primary concern of the Massiah

line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." 91 L.Ed.2d at 384.

The deliberate police efforts to obtain incriminating statements from Mr. Frederick through an informant mandate the issuance of a writ of habeas corpus here. Petitioner was arrested and charged with the instant murder on April 5, 1975, while already in custody for unrelated reasons. Clearly under the Federal standard enunciated in Massiah v. United States, supra, and progeny, any statements given by Petitioner to Edward Klusewitz -- a police agent -- should have been suppressed because the police circumvented his right to counsel, a right that had attached upon his arrest at least. Trial counsel were ineffective for

not so attempting to suppress, for this was the very state of the law in April 1975. In addition, Mr. Frederick respectfully submits that Maine v. Moulton, supra is not limited to the post-indictment stage but may well recognize, under certain special instances, the attachment of the right to counsel, where the prosecution -- though on the edge of filing a formal criminal complaint -- pauses precisely to secure the services of an agent in order to obtain an admission or confession and, thereafter, bring formal charges against the accused. ("The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State.")

While a defendant is the primary, exclusive suspect of the police, is then put

into custody on unrelated charges, and he is about to be arrested and charged though the prosecution team intentionally waits for the obtaining of an incriminating statement to make its case airtight, the same right to counsel should attach. For both reasons and as to both Klusewitz and Schaedler, trial counsel were ineffective for failing to suppress this evidence and, therefore, Mr. Frederick must be afforded a new trial.

Although Lt. Holloway denied, at the state PCRA hearing, instructing Schaedler to obtain evidence linking Petitioner to the murder, the trial transcript clearly indicates otherwise, for the prosecutor represented to the Trial Court in an offer that Lt. Holloway was going to testify that he did communicate with Schaedler on March 20 and, in fact, went so far as to provide

him with questions to ask Petitioner:

MR. MORRISEY:

This witness will testify that he is a member of the Pennsylvania State Police, that on March 20th, 1975, he visited the Berks County Prison and talked to one Arlan Schaedler who advised him that he had information regarding the murder of Dureme Kunkel, and further communicated with Schaedler concerning the murder of Dureme Kunkel and provided him questions to ask Frederick which were in act false in nature and false leads to determine whether or not Schaedler would report the same thing back or change them, of which Mr. Schaedler did report

> back to him that the false information given to him, after communicating with Mr. Frederick, was false.

Because this solicitation by Lt. Holloway of Schaedler occurred prior to the first incriminating statements "documented" by Schaedler, the only possible inference to be drawn is precisely that this information was obtained as a direct result of Lt. Holloway's visit to Schaedler in which, according to the trial prosecutor, Schaedler was given questions by the police officer to ask Petitioner.

Further evidence points to Schaedler operating as Lt. Holloway's man on the inside. In a memorandum written by Schaedler to Lt. Holloway dated March 22, 1975, Schaedler asks him: "What's my next

move?". In a written memorandum dated March 26, 1975, Schaedler inquires of Lt. Holloway: "What do you advise me to do?" And Schaedler questions Lt. Holloway, in a note dated April 3, 1975 (the day before the complaint was lodged against Petitioner): "What's next?" Given the extensive, documented communication between Schaedler and Lt. Holloway, little doubt remains as to their police-agent relationship. Schaedler therefore was acting as Lt. Holloway's agent while Petitioner was what Holloway himself characterized as the focus of the murder investigation. And on April 5, 1975, Petitioner was arrested and charged with the murder based on the information provided Holloway by Schaedler.

As with Schaedler, the record reveals that Edward Klusewitz, the other jailhouse

informant, also acted as a police agent on behalf of Holloway, though subsequent to Petitioner's arrest. While incarcerated at the Schuylkill County Prison in April 1975, Klusewitz testified he was transported to the Spring Township (Berks County) police department and charged with eleven burglaries. There, as he was in a holding cell for two days, Lt. Holloway and another officer visited him and stated their desire for information on Petitioner. According to Klusewitz, he was even offered a six to thirty-six month sentence on the pending burglary charges, which Lt. Holloway denied. The next morning Klusewitz was returned to the Schuylkill County Prison. Within a week, Petitioner was arrested for the murder (on April 5, 1975) and housed not in the Berks County Prison, the county having

jurisdiction, but rather in the Schuylkill County Prison where he was placed in a cell directly opposite Klusewitz'.

Although the affiant at the time, Trooper Robert A. Sease, testified at the PCRA hearing that Petitioner was taken to the Schuylkill County Prison upon his arrest because Schaedler had provided incriminating evidence against him, in fact, Schaedler was released from the Berks County Prison on the very day of Petitioner's arrest: April 5, 1975. This belies Trooper Sease's assertion that the reason Petitioner could not be kept at Berks County Prison (and was transferred to Schuylkill County Prison) was the possibility of reprisal against Schaedler from Petitioner. Schaedler was no longer at Berks County Prison after Petitioner's arrest. Moreover, Trooper Sease arrested

Petitioner at the PSP barracks on April 5, 1975 and arranged to have Schaedler present there as well; thus, Trooper Sease knew Schaedler was released that day.

Shortly after being housed at Schuylkill County Prison, Lt. Holloway of course began receiving notes from Klusewitz -- after Mr. Frederick's arrest and after his right to counsel had certainly attached -- containing incriminating evidence garnered from Petitioner. It was to these notes and conversations that Klusewitz testified at Petitioner's trial. All of this information was obtained as a direct result of Lt. Holloway's request and after Petitioner's arrest for the murder. There is no question that during the course of these efforts Klusewitz was acting as a police agent for Lt. Holloway.

A further examination of the record supports the inference that both Arlan Schaedler and Edward Klusewitz were acting as police agents when contacting Petitioner, Schaedler before and after his arrest and Klusewitz after his arrest. Indeed, Arlan Schaedler's first memorialized account of Petitioner's "confession" was dated March 20, 1975, and timed 8:25 p.m., shortly after Holloway's visit to the jail. In Commonwealth v. Berkheimer, supra, the Pennsylvania Supreme Court noted that the date of a police visit to an alleged agent in prison, determined by sign-in records, at least creates the inference that the police had solicited an inmate's assistance on that date. Id., 460 A.2d at 235. Arlan Schaedler's first contact as an agent predated Petitioner's arrest, and thus any

right to counsel cannot be said to have attached with certainty according to current Federal interpretation. Yet, Petitioner indisputably was the chief suspect in the murder at that time, as Lt. Holloway admitted, he was already in custody, and the complaint was filed a scant 15 days later -- on April 4, 1975. As this Court has held:

> Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." United States v.

> Wade, 388 U.S. 218, 224, 18 L.Ed.2d 1149, 87 S.Ct. 1926 91967) (quoted in United States v. Gouveia, 467 U.S. 180, 189, 81 L.Ed.2d 146, 104 S.Ct. 2292 (1984).

Maine v. Moulton, supra, 106 S.Ct. at 484, 88 L.Ed.2d at 492. This is the case here: by securing the statements through Schaedler, although technically prior to arrest and before the right to counsel had clearly attached, the Commonwealth was able to ensure an airtight case against Mr. Frederick, thereby reducing trial "to a mere formality," just as the Supreme Court envisioned.

Regarding Schaedler, this Court has not foreclosed the possibility that counsel may and should attach in certain pre-

indictment situations. This is one. Why should the right to counsel attach in certain pre-arrest scenarios? The need to preserve the right to counsel from circumvention by covert police activity is the most important policy consideration supporting the attachment of this right in certain pre-indictment situations. Here, Petitioner was the prime suspect in the murder. Knowing this the police undertook an extraordinary effort, documented above, to elicit a confession from him through the employ of an agent and make an airtight case against him before actually filing a criminal complaint. When a defendant is the primary focus of an investigation and is incarcerated for unrelated reasons, he ought to be afforded the same right to counsel as after arrest; otherwise that right is

effectively nullified by undercover policy activity.

Second, acknowledgment of such a right would preserve the integrity of admissions or confessions in fact obtained on the inside. Arlan Schaedler was acting as a professional snitch, making a business out of garnering "confessions" and then relating them to the police in exchange for leniency on his own charges. Klusewitz, keep in mind, has recanted his confession, admitting that he and Schaedler had lied at Petitioner's trial. (The state trial court refused to accept the recantation.) Only the jury was ignorant of the inherent unreliability of the jailhouse confessions related to them, and such confessions <u>are</u> inherently unreliable and an affront to the truth-determining process of a jury trial.

To combat this increasing problem in the criminal justice system, the state of California, for example, has recently enacted a statutory bar to the eliciting of incriminating statements by the police from jailed defendants through "in-custody informants." The legislative impetus to this statute emanated from the celebrated case of a Los Angeles County jail inmate who admitted he routinely lied at many trials, claiming fellow inmates had confessed to him, in return for leniency. Enacted in 1989, Section 4001.1(b) of the California Penal Code on "In-custody informant; payment; elicit incriminating remarks" states:

> No law enforcement agency and no in-custody informant acting as an agent for the

> agency, may take some action, beyond merely listening to statements of a defendant, that is deliberately designed to elicit incriminating remarks.

An "in-custody informant" is defined as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution." California Penal Code, section 1127(a). California has recognized the important public policy benefit to be derived from statutorily prohibiting obtaining such confessions by making it illegal outright. (This Honorable Court, most recently in Illinois v. Perkins, 495 U.S. 292, 110 L.Ed.2d 243, 110 S.Ct. 528

(1990), has refused to apply Miranda safeguards to prison settings as a matter of course. See "Ilinois v. Perkins: Has Our Criminal Justice System Turned from "Accusatorial" to "Inquisitorial"?", 42 U.Pitt.L.R. 669 (Spring 1991)).

Failing to consider this claim will result "in a fundamental miscarriage of justice." Coleman v. Thompson, 111 S.Ct. 2546, 2565 (1991). For too long too many have been convicted, like Petitioner, through the use of "confessions" elicited on the inside by fellow inmates acting at the behest of the police, inmates often well known to judges and prosecutors alike as nothing but professional liars; the only ones not to know are the most important -- the jurors. Indeed, the affiant here, who retained the services of Klusewitz and

Schaedler, candidly testified at the evidentiary hearing that he would put Schaedler "in the same class as Klusewitz, they're both liars."

Conclusion

WHEREFORE, Petitioner, Steven D. Frederick, respectfully requests that Your Honorable Court grant this writ and consider his appeal on the merits.

RESPECTFULLY SUBMITTED:

William C. Costopoulos, Esquire
COSTOPOULOS, FOSTER & FIELDS
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Phone: (717) 761-2121
COUNSEL OF RECORD FOR PETITIONER

DATED: August 3, 1994.

APPENDIX

Page

Judgment Order of the United States Court of Appeals for the Third Circuit, entered on May 5, 1994, affirming the judgment of the District Court A48

Order of the Third Circuit dated October 26, 1993, granting the certificate of probable cause A50

Order of the District Court for the Eastern District of Pennsylvania dated February 8, 1993, denying the petition for writ of habeas corpus and certificate of probable cause for appeal A51

Order and Opinion of the Magistrate Judge of the District Court dated December 9, 1992, recommending the denial of the petition for writ of habeas corpus and certificate of probable cause for appeal A53

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

FREDERICK,
Petitioner

v. No. 93-1255

STEPANIK, et al.

BEFORE: SLOVITER, CHIEF JUDGE, HUTCHINSON AND SEITZ, CIRCUIT JUDGES

JUDGMENT ORDER

After exhausting his state court remedies without success, Steven D. Frederick ("petitioner"), a state prisoner serving a life term for murder, filed a petition in the district court seeking a writ of habeas corpus. It was referred to a magistrate-judge.

Petitioner raised two constitutional grounds for the issuance of the writ. The

magistrate-judge recommended that the district court deny a writ, which it did. Petitioner appeals.

Petitioner advances two constitutional issues, both involving ineffective assistance of counsel in the state proceedings.

Given the record in the state proceedings, we find no error in not affording petitioner a separate evidentiary hearing. Next, the record does not show a constitutional violation. It is,

ADJUDGED AND ORDERED that the judgment of the district court entered February 16, 1993, be and is hereby affirmed.

BY THE COURT:

/s/
Circuit Judge

DATED: May 5, 1994.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

FREDERICK,
Petitioner

v. No. 93-1255

STEPANIK, et al.

ORDER

The foregoing request for a certificate of probable cause is granted.

BY THE COURT:

/s/
Circuit Judge

DATED: October 26, 1993.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK,
Petitioner

vs. No. 92-5305

STEPANIK, et al.

TROUTMAN, S.J.

ORDER

AND NOW, this 8th day of February, 1993, upon careful and independent consideration of the petition for writ of habeas corpus, and after careful review of the Report and Recommendation of United States Magistrate Judge James R. Melinson (Doc. #6) and the objections thereto (Doc. #7), IT IS ORDERED that:

1. The Objections are OVERRULED;

2. The Report and Recommendations is

APPROVED and ADOPTED as the opinion of the Court;

3. The petition for writ of habeas corpus is DENIED and DISMISSED without an evidentiary hearing; and

4. There is no probable cause for appeal.

/s/
E. Mac Troutman, S.J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK,

vs. No. 92-5305

STEPANIK, et al.

JAMES R. MELINSON
U.S. MAGISTRATE JUDGE

Before this court is a counselled petition for a writ of habeas corpus, filed by Steven D. Frederick, pursuant to 28 U.S.C. §2254. Frederick is currently incarcerated at the State Correctional Institute [sic] at Dallas, Pennsylvania. For the reasons set forth below, it is recommended that Frederick's petition be denied and dismissed without an evidentiary hearing.

FACTS AND PROCEDURAL HISTORY

On May 23, 1977, Frederick was convicted of first-degree murder, burglary, aggravated assault, robbery and theft by unlawful taking in the Court of Common Pleas, Berks County, Pennsylvania. Frederick's post-trial motions were denied, and he was sentenced to life in prison.

Frederick filed a direct appeal to the Supreme Court of Pennsylvania on July 3, 1980. Frederick's appeal was denied per curiam on May 27, 1983.

On December 2, 1988 Frederick filed a Post Conviction Relief Act ("PCRA") petition with the Court of Common Pleas of Berks County. The PCRA court denied Frederick's petition on March 28, 1989. Commonwealth v. Frederick, Court of Common Pleas of Berks County, No. 743-75 (1990). The Superior Court of Pennsylvania affirmed the PCRA

court on July 23, 1990. Commonwealth v. Frederick, 404 Pa.Super. 646, 580 A.2d 1163 (1990). The Supreme Court of Pennsylvania granted allocatur and, after the filing of briefs and oral argument, affirmed the Superior Court per curium [sic] on February 14, 1992. Commonwealth v. Frederick, 601 A.2d 807 (Pa.1992). In the instant habeas petition, Frederick raises the following two issues:

1) That trial counsel was ineffective for advising Frederick not to testify and for failing to obtain a ruling on the admissibility of Frederick's prior criminal record; and

2) That trial counsel was ineffective for not attempting to suppress the trial testimony of two jailhouse informants, and that appellate counsel was ineffective for

not raising the admission of the testimony into evidence as an error on direct appeal.

DISCUSSION

Before a state prisoner may seek habeas corpus relief in federal court, he must exhaust all available state court remedies and afford the state courts a meaningful opportunity to consider his claims. 28 U.S.C. §2254(b); Vasquez v. Hillery, 474 U.S. 254 (1986); Picard v. Connor, 404 U.S. 270 (1971). Exhaustion does not require that the highest state rule on the merits, but it does require that the court be given the opportunity to review them. Bond v. Fulcomer, 864 F.2d 306 (3d Cir.1989). Because Frederick has presented his claims to the Supreme Court of Pennsylvania, he has satisfied the exhaustion requirement of 28

U.S.C. §2254(b).

However, the instant case requires further analysis of the claims presented because it appears that Frederick has procedurally defaulted on one of his claims. Federal courts generally may not review a state court's denial of a state prisoner's federal constitutional claim if the state court's decision rests on a state procedural default that is independent of the federal question and adequate to support the prisoner's continued custody. Coleman v. Thompson, 111 S.Ct. 2546, 2554 (1991). Where petitioner's procedural default prevents a state appellate court from hearing a habeas claim, "there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which petitioner

actually presented his claims." Coleman, 111 S.Ct. at 2257 n. 1 (citing Harris v. Reed, 489 U.S. 255, 269-270 (1989) (O'Connor, J., concurring); Teague v. Lane, 489 U.S. 288, 297-298 (1989)). This result is in accord with a policy of "recognizing the important interest in finality served by state procedural rules, and the significant harm that results from the failure of federal courts to respect them." McClesky v. Zant, 111 S.Ct. 1454, 1468 (1991).

On appeal from the PCRA court, the Superior Court of Pennsylvania determined that Frederick waived the issue that trial counsel was ineffective for advising Frederick not to testify and for failing to obtain a ruling on the admissibility of Frederick's prior criminal record. Commonwealth v. Frederick, 404 Pa.Super.

646, 580 A.2d 1163 (1990). The court based its decision on Section 9544(b) of the Post Conviction Relief Act, which provides:

> (b) Issues Waived - For the purposes of this subchapter, an issue is waived if: (1) The petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually initiated under the subchapter.

42 Pa.C.S.A. §9544(b).

The Superior Court determined that because this issue was not raised in post trial motions, which was the "earliest state in the proceedings when counsel, whose

ineffectiveness was being challenged, no longer represented the petitioner," Commonwealth v. Frederick, 404 Pa.Super. 646, 580 A.2d 1163 (1990) (quoting Commonwealth v. Webster, 490 Pa. 322, 325, 416 A.2d 491, 492 (1980)), this issue was effectively waived.

As a result, Frederick's procedural default on this issue forecloses review of this claim in federal habeas proceedings unless Frederick can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 111 S.Ct. at 2565.

In the instant habeas petition, Frederick has not alleged cause or prejudice

for his failure to present the waived issue in his appeal immediately following the dismissal of trial counsel. Frederick also fails to offer any evidence that this court's waiver of those issues will result in a "fundamental miscarriage of justice." A petitioner's failure to allege "cause and prejudice" will result in forfeiture of a claim that the waiver is a fundamental miscarriage of justice." Teague v. Lane, 489 U.S. at 297-298 (1989).

Frederick's remaining claim, that trial counsel was ineffective for not attempting to suppress the trial testimony of two jailhouse informants during Frederick's trial, and that appellate counsel was ineffective for not raising the admission of the testimony into evidence as an error on direct appeal, is without merit. Frederick

claims that the informants were acting as agents for the state police when the informants solicited statements from Frederick in violation of Miranda. In support of this claim, Frederick points to letters allegedly written by two jailhouse informants stating that the informants were solicited by the police to incriminate Frederick, and to the recantation testimony at the PCRA hearing of one of the jailhouse informants. [Footnote 1: In his petition, Frederick represents that he made substantial efforts to secure the presence of both jailhouse informants at the PCRA hearing, but that he has reason to believe that one of the informants is deceased. Petition for Writ of Habeas Corpus, page 10.] The PCRA court considered the letters and the testimony in March, 1989. See

Commonwealth v. Frederick, Court of Common Pleas of Berks County, No. 743-75 (1990), Appendix to Petition for Writ of Habeas Corpus, Volume 1, pages 23a-59a, 79a-92a. The letters and the recantation testimony were submitted as evidence more than ten years after Frederick's trial, and six years after his last direct appeal was denied.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court of the United States formulated a two pronged test to evaluate claims of ineffective assistance of counsel. Under the Strickland test, in order to support a claim of ineffective assistance of counsel, Frederick must show that counsel's performance was deficient, and that the deficient performance so prejudiced the defense as to deprive Frederick of a fair trial. Strickland, 466

U.S. at 687.

In assessing the deficiency of counsel's performance, the Supreme Court adopted a reasonableness standard guided by the prevailing professional norms of practice. Id. at 688. See also Gov't of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir.1989) (test is reasonableness under prevailing professional standards). The Supreme Court instructed:

> a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or

omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omission were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to

> have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 690.

In the instant case, counsel's failure to attempt to suppress the testimony of the jailhouse informants and failure to raise the admission of the testimony as an error on direct appeal was not unreasonable. "A habeas corpus petitioner cannot demonstrate prejudice from counsel's failure to object unless there is a legally supportable argument for excluding the statements." See U.S. ex rel. Link v. Link, 811 F.2d 1166, 1168 (7th Cir.1987). Because neither Frederick's trial counsel nor his appellate counsel possessed any evidence on which to move to purge the jailhouse informants'

testimony from the record, any objection in trial or argument on appeal concerning the testimony would have been plainly lacking in merit. Because a legal argument cannot be sustained unless it is grounded in existing facts or evidence, neither trial counsel's decision not to attempt to suppress the trial testimony of the informants as agents for the police nor appellate counsel's failure to argue on appeal that the testimony was wrongly admitted into evidence constitutes ineffective assistance.

Even is this court assumed, for the sake of argument, that trial and appellate counsel's performances were deficient, Frederick's ineffectiveness claim would fail because no prejudice resulted from the admission of the informants' testimony into evidence. Frederick was not prejudiced by

the admission of the informants' testimony because the recantation testimony and the letters are unreliable.

The PCRA court, following a full evidentiary hearing, was "not at all satisfied with the truthfulness of the testimony" and determined that the recantation testimony lacked credibility. Commonwealth of Pennsylvania v. Steven D. Frederick, Court of Common Pleas of Berks County, No. 743-75 (1990). The PCRA court stated, "recantation testimony is considered extremely unreliable and it is the duty of the trial court to deny a new trial unless satisfied such testimony is true." Commonwealth v. Bernstein, 309 Pa.Super. 573, 455 A.2d 1232 (1983) (citing Commonwealth v. Gaddy, 492 Pa. 434, 424 A.2d 1268 (1981); Commonwealth v. Nelson, 484 Pa.

11, 398 A.2d 636 (1979); Commonwealth v. Coleman, 438 Pa. 373, 264 A.2d 649 (1970)). On appeal, the Superior Court of Pennsylvania found that the PCRA court properly rejected the recantation testimony.

In federal habeas review, the credibility findings of the state PCRA court are given a "presumption of correctness." Landano v. Rafferty, 856 F.2d 569 (3d Cir.1988). In Landano, the United States Court of Appeals for the Third Circuit stated that a "[h]earing in state post conviction proceedings, in which it was determined that a witness's recantation of his prior identification was not credible, comported with due process standards, so that determination was entitled to a presumption of correctness in federal habeas corpus proceedings." Id. at 569.

This court accords deference to the PCRA court's finding that the evidence presented by the recantation testimony and letters was not credible. Taking the lack of credibility of the letters and the recantation testimony into consideration, this court concludes that the admission of the trial testimony of the jailhouse informants into evidence did not prejudice Frederick because the evidence that the informants were police agents was unreliable.

Frederick has had the opportunity to fully litigate the issue of trial counsel's ineffectiveness for failing to attempt to suppress the informants' testimony and appellate counsel's ineffectiveness for failing to raise the admission of the testimony into evidence as an error in the

Philadelphia [sic] Court of Common Pleas, the Superior Court of Pennsylvania, and the Supreme Court of Pennsylvania. No due process violation has been committed.

Therefore, I make the following:

R E C O M M E N D A T I O N

AND NOW, this 9th day of December, 1992, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED and DISMISSED without an evidentiary hearing. There is no probable cause for appeal.

BY THE COURT:

/s/
JAMES R. MELINSON
U. S. M. Judge

FILED
SEP 2 1994
OFFICE OF THE CLERK

No. 94-229

In The

Supreme Court of the United States

October Term, 1994

STEVEN D. FREDERICK,

Petitioner,

vs.

JOHN STEPANIK, Superintendent, State Correctional Institution at Dallas, PA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether petitioner's Sixth Amendment right to effective assistance of counsel was violated when trial counsel did not move to suppress the testimony of two prosecution witnesses at trial?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On February 12, 1975, Doreme Kunkel was found dead in her home. She had been stabbed over thirty times. On February 14, 1975, the police spoke with Steven Frederick as a witness with regard to the actions of Roger Kunkel, the victim's son, on February 11th and 12th. After polygraph examinations were

administered to relatives and acquaintances of the victim, including Frederick, on the 18th and 19th of February, Frederick became a suspect in the murder.

On March 5, 1975, Frederick was incarcerated at Berks County Prison for a parole violation. Within a week of his incarceration, Frederick had his first conversation with Arlan Schaedler. Schaedler was also incarcerated in Berks County Prison, charged with driving his mother-in-law's car without her consent and theft by deception of that car. Schaedler was a "jailhouse lawyer" who assisted other inmates with their legal questions. Schaedler had spent thirty years in penal institutions.

On March 20, 1975, Frederick asked Schaedler to help him file a motion to get him committed to Wernersville State Hospital. Schaedler asked Frederick questions about why he wanted to get committed and Frederick told him that he was involved in a murder of a woman in a trailer park. Frederick told Schaedler that he had stabbed a woman thirty some times and robbed her. Schaedler made notes of this conversation.

On March 21, 1975, Lieutenant Donald Holloway of the Pennsylvania State Police interviewed Schaedler with regard to an armed robbery investigation. Schaedler advised Holloway that he had information about Frederick's involvement in the Kunkel murder. Holloway came back to the prison that night and Schaedler gave him the notes he had made on the 20th. Subsequently, Schaedler made notes of conversations that he had with Frederick on six other occasions. Schaedler sent all of these notes either to the warden or gave them to Holloway. Included with Schaedler's notes was a drawing by Frederick showing where he disposed of the box he took from the victim's home.

On April 2, 1975, Trooper Robert Sease prepared an arrest warrant for Frederick for the murder of Doreme Kunkel, the

probable cause for which was based in part on Frederick's admissions to Schaedler. Since Schaedler was going to be a witness in the Frederick murder case, Sease requested that Frederick be transferred to Schuylkill County Prison when the arrest warrant was served on him in Berks County Prison so that he would be separated from Schaedler. On April 5, 1975, Frederick was arrested and transferred as Sease had requested. At some time on that same day, Schaedler's mother-in-law dropped the charges against him and he was released from Berks County Prison.

In March of 1975, Holloway was called to the Spring Township Police Department by the police chief to talk with Edward Klusewitz regarding burglaries to which he had confessed. After speaking with Klusewitz as to the locations of the burglaries, Holloway realized that they did not occur within areas where the investigations are conducted by the State Police. Neither Klusewitz nor Holloway spoke of the Frederick case.

Klusewitz was incarcerated in Schuylkill County Prison in a cell near Frederick's cell. On April 10, 1975, after Klusewitz returned from a court appearance in Berks County, Frederick approached Klusewitz and asked if he had heard anything about him in the courthouse. Klusewitz kept notes of his conversations with Frederick on April 10, 11, 23 and 25, 1975, which he turned over to the prison warden, who then sent them to the State Police. Although these conversations with Frederick touch on details about the murder and the investigations, Frederick never told Klusewitz that he had stabbed Mrs. Kunkel.

Schaedler and Klusewitz both testified at Frederick's trial in May 1977. Schaedler testified that he had not been promised, nor had he received, any favors in return for his testimony and that the state police had never gotten him off any charges as a result of his cooperation. He was not imprisoned nor did he have pending charges in May 1977. Klusewitz testified that he had not been

promised, nor had he received any favors as a result of his cooperation in the Frederick's trial. Klusewitz had been released from jail on December 6, 1976, after serving the one and a half year minimum on his burglary convictions.

On May 23, 1977, the jury convicted Frederick, *inter alia*, of first degree murder. On January 3, 1980, the Honorable Warren K. Hess, the trial judge, held an evidentiary hearing on post trial motions, which were denied in an Order and Opinion dated March 5, 1980. He was sentenced to life imprisonment on June 5, 1980. His direct appeal was denied by the Supreme Court of Pennsylvania *per curiam* on May 27, 1983.

On February 2, 1988, Frederick, through counsel, filed a petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"). The PCRA Petition raised *inter alia* the issue of after-discovered evidence in the form of recantation testimony of Schaedler and Klusewitz. On February 27, 1989, counsel filed a Supplemental PCRA Petition in which he alleged that Schaedler and Klusewitz were both acting as police agents at the time of their contacts with Frederick in prison and that trial counsel was ineffective for not moving to suppress the testimony of Schaedler and Klusewitz.

At the PCRA hearing, Klusewitz recanted his trial testimony. Schaedler did not testify at the hearing, although counsel introduced an undated, unauthenticated letter which was purported to be a letter from Schaedler to Frederick which allegedly recanted his trial testimony. Although Klusewitz could not identify with any certainty his own writing on the documents which were introduced as letters from Klusewitz to the Attorney General's Office, Klusewitz testified that the signature on the "Schaedler" letter as that of Arlan Schaedler.

The Honorable Thomas J. Eshelman denied the PCRA

Petition. Judge Eshelman found Klusewitz's recantation testimony to be incredible. He wrote that "we were not at all satisfied with the truthfulness of the testimony." On appeal, the Superior Court of Pennsylvania affirmed the PCRA court, concluding that the PCRA court did not abuse its discretion in resolving the issue of credibility in favor of Klusewitz's trial testimony and against his recantation testimony. The Superior Court also found that previous counsel were not ineffective with regard to the issue of the suppression of Schaedler and Klusewitz's testimony based on their being police agents since the only evidence that those witnesses were police informants was in the rejected recantation testimony of Klusewitz. On February 14, 1992, the Supreme Court of Pennsylvania affirmed the Superior Court *per curiam*. *Commonwealth v. Frederick*, 601 A.2d 807 (Pa. 1992).

On September 10, 1992, Frederick filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania. He requested relief *inter alia* on the grounds that trial counsel was ineffective for not attempting to suppress the testimony of the "jailhouse informants", Schaedler and Klusewitz, who were acting as police agents in contacting Frederick, and that appellate counsel was ineffective for not raising the error on appeal. Magistrate Judge James R. Melinson recommended that the petition be denied and dismissed without an evidentiary hearing.

In his Report and Recommendation, Judge Melinson found that neither trial nor appellate counsel possessed any evidence on which to move to suppress the testimony of Schaedler and Klusewitz so that any objection at trial or argument on appeal would have been meritless. The Court gave the PCRA court's finding, which was reached after a full evidentiary hearing, that the evidence presented by the recantation testimony and letters were not credible, a presumption of correctness. Since the evidence that Klusewitz and Schaedler were police agents was unreliable, the

admission of the testimony of the two witnesses at trial did not prejudice Frederick. Therefore, even if counsel's actions were deficient in not filing for suppression of the testimony, Frederick could not satisfy the prejudice prong of the test for his ineffectiveness claim.

Frederick filed Objections to the Report and Recommendation. On or about February 8, 1993, Senior Judge E. Mac Troutman overruled the Objections, approved and adopted the Report and Recommendations, denied and dismissed the petition and found no probable cause for appeal. On or about October 26, 1993, the United States Court of Appeals for the Third Circuit granted Frederick's request for a certificate of probable cause. In a Judgment Order dated May 5, 1994, issued by Chief Judge Sloviter and Circuit Judges Hutchinson and Seitz, the Third Circuit Court of Appeals affirmed the judgment of the district court, finding that the district court did not err in not affording petitioner an evidentiary hearing and that the state record did not show a constitutional violation.

REASONS FOR DENYING THE WRIT

The instant petition fails to show any error in the decision of the Third Circuit Court of Appeals affirming the judgment of the District Court. All the courts below properly followed and applied the law to the facts of record in this case. Petitioner has failed to show any decision rendered by any court which conflicts with the outcome in this case. Instead, petitioner relies on misstatement of the record facts and on recantation testimony which was specifically rejected by the state court as incredible to support his claim that two witnesses were jailhouse informants. The actual record reveals no evidence that either witness acted as a police agent. The only issue which petitioner has exhausted is a claim of ineffectiveness of counsel with regard to trial counsel's failure to file a suppression motion as to the testimony of these two

witnesses. Since this missing police agency is essential to the ineffective assistance of counsel claim, petitioner is unable to meet his burden in showing ineffectiveness. In fact, he cannot show a violation of any of his constitutional rights. Petitioner is also, on the actual facts of this case, unable to support his argument of an important public policy consideration to extend the present Sixth Amendment right to counsel to pre-arrest situations where a police agent elicits a confession from a defendant who is incarcerated on other charges. Thus, petitioner having failed to present any special or important reasons for review, the writ should be denied.

ARGUMENT

Frederick contends that his conviction was obtained through incriminating statements extracted deliberately by two police agents while he was incarcerated. Throughout this habeas proceeding, Frederick has presented this issue as a claim of ineffectiveness of counsel for failing to move to suppress the testimony of these two witnesses, since that is the claim which he exhausted in the state court system. Essential to his claim of ineffectiveness is evidence that the two witnesses were police agents. The record in this case does not supply that evidence.

Therefore, throughout the proceedings in this case, Frederick has consistently relied on an offer of proof by the prosecuting attorney at trial, misstatement of the facts of record and rejected recantation testimony to make his argument. After examining the actual record in the case, each court has found that Frederick's claim is meritless. He cannot meet his burden in showing that counsel was ineffective for failing to move to suppress evidence when there was and still is no evidence in the actual record to show that the two witnesses were police agents. Simply put, the constitutional issues for which petitioner seeks review are absent on the facts of this record.

A. Arlan Schaedler

The first witness whose testimony Frederick claims should have been suppressed because he was an agent of the police is Arlan Schaedler. First of all, all of Schaedler's contact with Frederick occurred before he was arrested for the murder of Doreme Kunkel. Therefore, the present state of the law is that Frederick had no Sixth Amendment right to counsel at the time of those conversations. Furthermore, although Frederick urges this Honorable Court to extend that right to counsel to cover pre-arrest situations when a police agent obtains a confession from a defendant incarcerated on other charges, Frederick can only present facts unsubstantiated in the record and an offer of proof by the prosecuting attorney as evidence that Schaedler was a police agent. Without the police agency, Frederick's trial counsel had no basis to move to suppress Schaedler's testimony.

The law available to trial counsel with regard to Schaedler's testimony was the same as it is today. The Sixth Amendment right to counsel is offense-specific and "does not attach until a prosecution is commenced . . . 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " *McNeil v. Wisconsin,* 501 U.S. 171, ___, 115 L. Ed. 2d 158, 166-167 (1991), *quoting United States v. Gouvela,* 467 U.S. 180, 188, 81 L. Ed. 2d 146, ___ (1984), *quoting Kirby v. Illinois,* 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417 (1972) (plurality opinion). Furthermore, this Honorable Court has stated that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Maine v. Moulton,* 474 U.S. 159, 180, n. 16, 88 L. Ed. 2d 281, 499, n. 16 (1985).

Clearly, in the case *sub judice,* all of the conversations with Frederick to which Schaedler testified at trial occurred before Frederick was charged with the murder of Mrs. Kunkel. The last conversation to which Schaedler testified occurred on April 3,

1975; Frederick was arrested on the instant charges on April 5, 1975. Therefore, under the law, both now and in 1975, trial counsel had no basis to move to suppress Schaedler's testimony on Sixth Amendment grounds since Frederick was not charged *even if* the police asked Schaedler to talk to Frederick. However, the facts of record show that Frederick approached Schaedler, who then approached the police.

Frederick has consistently stated throughout these post-conviction proceedings that Lieutenant Holloway met with Arlan Schaedler on March 20, 1975, at Berks County Prison and instructed Schaedler to obtain evidence linking Frederick to the murder of Mrs. Kunkel. Yet, Schaedler's testimony at trial was that Frederick approached him on March 20, 1975, and asked him for legal assistance. Schaedler's note dated March 20, 1975, in which he recorded the conversation with Frederick, states the same facts. Schaedler testified that he told Lieutenant Holloway the following day, which would have been the 21st, that he had information on the murder.

The only other testimony as to Lieutenant Holloway's initial contact with Schaedler occurred nearly fourteen years later at Frederick's PCRA hearing. Lieutenant Holloway testified that, although he no longer knew the date of his first contact with Schaedler, Schaedler advised him at that first meeting that he had information about the murder. Holloway testified that he never asked Schaedler to talk to Frederick and that he never gave him information about the murder. He stated that he might have suggested some things to Schaedler to determine whether Schaedler was telling the truth but not questions to ask Frederick.

Frederick relies solely on an offer of proof at trial by the prosecuting attorney as evidence that Holloway met with Schaedler on March 20, 1975. He is unable to show any testimony by either Schaedler or Holloway, the participants in the meeting, to

that effect. Although there was an offer of proof as to Holloway's potential testimony, Holloway did not, in fact, testify at trial. The prosecuting attorney's offer of proof was merely what the attorney thought his witness would say. In fact, the offer does not allege that Holloway used Schaedler as an informant. It basically states the same facts to which Holloway testified fourteen years later: that at the first meeting Schaedler advised Holloway that he had information regarding the Kunkel murder and that Holloway tested Schaedler's credibility.

Frederick has also consistently insisted to the courts that Schedler acted as a professional snitch, exchanging confessions he elicited from other inmates for leniency on his own charges. The record does not support this allegation. Schaedler testified that by the time of trial he had spent thirty years in penal institutions. He was fifty-six years old. If he was cooperating in order to get deals for himself, he was not getting very good deals. He admitted to one instance of cooperation with the police in an armed robbery case since Holloway had interrogated him on those charges. He denied that he was receiving any consideration for testifying against Frederick.

Schaedler's denial of consideration for his testimony is amply supported in the record. At the time he first approached Holloway, Schaedler was imprisoned on charges for which his mother-in-law was the victim. She chose to drop those charges on April 5, 1975, and Schaedler was released from custody. At the time of Frederick's trial, two years later, Schaedler was not in prison and had no pending charges. Therefore, the state, even if it had wanted to so ensure Schaedler's testimony, had nothing on which to grant Schaedler leniency.

In order to show a violation of his right to counsel, Frederick "must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to

elicit incriminating remarks." *Kuhlman v. Wilson,* 477 U.S. 436, 459, 91 L. Ed. 2d 364, 384-385 (1986). This record shows that Frederick approached Schaedler for legal assistance before Frederick was arrested for the murder of Doreme Kunkel. When Schaedler asked questions about the basis for this assistance, Frederick made admissions about the murder. Schaedler then turned this information over to the police. Schaedler did not and could not have received any leniency for this information or his subsequent testimony.

Although Frederick claims that he does not rely on the PCRA recantation testimony of Edward Klusewitz, which was firmly rejected as incredible by the PCRA court, he refers to that testimony in his petition to this Honorable Court. He specifically states: "Mr. Klusewitz also testified that Mr. Schaedler told him, in a *holding cell* at Petitioner's trial, that Mr. Schaedler's testimony was untruthful and *was intended to secure a more lenient sentence."* (Petition, p. 12) (*emphasis added*). Frederick's exaggeration of the record is apparent in this statement. Since neither Schaedler nor Klusewitz was in prison at the time of Frederick's trial, they certainly were not kept in a holding cell at the time of the trial. In fact, Klusewitz testified at the PCRA hearing that he and Schaedler, along with some state police, were in a room where they kept the witnesses. Furthermore, as already stated, there were no charges for which Schaedler could be seeking a more lenient sentence.

Frederick later in his Petition urges this Honorable Court to *keep in mind* that Klusewitz "has recanted his confession, admitting that he and Schaedler had lied at Petitioner's trial." (Petition, p. 42). These facts should not be *kept in mind* or relied upon, since the state court firmly found as fact that Klusewitz's recantation testimony was incredible.

Frederick also alleges that Frederick was repeatedly

questioned by the police, especially Lieutenant Holloway. (Petition, p. 5). This allegation is unsupported in the record. The only contact between Frederick and the police shown in the record is that Frederick was questioned once as a witness as to the actions of the victim's son around the time of the murder. He then, along with many other witnesses, took a polygraph test. Neither of these police contacts were conducted by Lieutenant Holloway.

Another misrepresentation of record fact in the instant petition is Frederick's allegation that Trooper Sease knew that Schaedler was released on April 5, 1975, and that he knew there was no reason, therefore, to send Frederick to Schuylkill County Prison. (Petition, p. 11; pp. 36-37). Trooper Sease testified that the arrangements for the transfer had to be made through the court before Frederick was arrested. Trooper Sease testified that he had no knowledge that Schaedler was going to be released.

This record is simply devoid of any evidence that Arlan Schaedler acted as a police agent. Without that agency, there is no factual basis for his constitutional ineffectiveness claim or for his argument that the law as to confessions obtained by police agents be extended to cover a pre-arrest situation.

B. Edward Klusewitz

Frederick also contends that another Commonwealth witness, Edward Klusewitz, was recruited by Lieutenant Holloway to obtain incriminating statements from him after his arrest in violation of his Sixth Amendment right to counsel. Neither the law nor the record supports this claim.

"The primary concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlman v. Wilson, supra,* at 459, 91 L. Ed. 2d at 384. This Honorable Court went on to say:

> . . . Since "the Sixth Amendment is not violated whenever — by luck or happenstance — the State obtains incriminating statements from the accused after the right to counsel has attached," . . . a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, *the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.*

Id. (citations omitted) (emphasis added).

If a state post-conviction hearing is full, fair and adequate and comports with due process standards, then the state court's credibility finding is entitled to a presumption of correctness under 28 U.S.C. § 2254(d). It is Frederick's burden to establish by convincing evidence that the factual determination made by the state court was erroneous. In the instant case, Frederick makes no assertions that the PCRA evidentiary hearing was inadequate. In fact, he does not even claim that the PCRA court's credibility finding as to Klusewitz is not supported by the record. Therefore, the district court properly gave a presumption of correctness to the PCRA court's finding that the evidence presented by Klusewitz's testimony and letters was incredible.

The Commonwealth agrees that Frederick was charged with murder at the time of his conversations with Klusewitz. That fact alone is insufficient to establish a Sixth Amendment violation. Without the rejected Klusewitz testimony and letters, this record is devoid of any evidence which would demonstrate that Klusewitz was a police agent.

Frederick claims, as he did with regard to Schaedler's testimony, that Klusewitz is simply lying and that Frederick never made the statements to which Klusewitz testified. Frederick supplies no evidence that Klusewitz took any action to deliberately elicit incriminating remarks. He simply says that Klusewitz lied.

Since the Sixth Amendment is not violated whenever the State obtains incriminating statements from an accused after the right to counsel has attached, Frederick must show more than that he was under arrest when the statements were made. He must show that Klusewitz and the police took some action, beyond merely listening that deliberately elicited the incriminating remarks. *Kuhlmann v. Wilson, supra.* Since Klusewitz's testimony and letters were rejected as incredible by the PCRA court, Frederick's evidence must come from somewhere else in the record.

Although Frederick contends that he does not rely on the PCRA testimony to show that Klusewitz was a police agent, he relies heavily on that testimony throughout his petition before this Honorable Court. Without the facts which are only present in this record in Klusewitz's PCRA testimony, the evidence of Klusewitz's "police-agent status" is reduced to the facts that Lieutenant Holloway spoke with Klusewitz in Spring Township in March, 1975, and that Frederick was transferred to Schuylkill County Prison after his arrest on April 5, 1975. Thereafter, Frederick spoke with Klusewitz who documented the conversations and forwarded the information to the Pennsylvania State Police. The existing record clearly rebuts any inference, if there is one, arising from Holloway's meeting with Klusewitz and establishes that Klusewitz's trial testimony was not obtained in violation of Frederick's rights.

At the PCRA hearing, Holloway testified that he was called by the Spring Township police chief to speak with Klusewitz about burglaries to which he had confessed. At trial, Klusewitz testified

that in 1975 he had eleven burglaries to which he pled guilty. Since Klusewitz was giving statements about the other participants in the burglaries who were likely incarcerated at Berks County Prison, it makes sense that he was housed in Schuylkill County Prison and brought down to Spring Township rather than Berks County Prison when he came to court. Holloway testified that, when he realized that none of the burglaries were in the area where the investigations were handled by the State Police, he left. Holloway stated that he did not discuss the Frederick case with Klusewitz.

Klusewitz testified at trial that he had not been promised, nor did he receive, any favors for his testimony against Frederick. Holloway testified at the PCRA hearing that he never promised Klusewitz anything and that he never spoke at any sentencing hearing for Klusewitz. He also testified that he had no part in arranging for Frederick's transfer to Schuylkill County Prison. At the time of his trial testimony, Klusewitz had finished serving his prison sentence on the 1975 burglary charges and had no pending charges.

Trooper Sease explained at the PCRA hearing that arrangements were made on April 2, 1975, to send Frederick to Schuylkill County Prison in order to keep him and Schaedler separated. Sease had no knowledge on April 2 that Schaedler's mother-in-law would drop the pending charges against him allowing him to be released from Berks County Prison.

Klusewitz's first note reflecting a conversation with Frederick was dated April 10, 1975. The note indicates that Frederick approached Klusewitz on Klusewitz's return from a court appearance. Frederick asked Klusewitz if he heard anything about Frederick's case. In the course of that conversation, Frederick offered information about the box for which the police were looking and Frederick's need for an alibi between 1:30 and 5:00 a.m. Although the record is not clear on when Klusewitz first

contacted the State Police, Holloway testified that Klusewitz said that he already had information about the murder when he contacted them. Klusewitz then forwarded his notes recording the conversations with Frederick to the State Police.

The only evidence which contradicts the above facts is the Klusewitz PCRA testimony which was found incredible. Frederick, although claiming that he does not rely on the rejected testimony, colors the above facts of record by peppering his petition with references to facts which only exist in Klusewitz's PCRA testimony. (*See* Petition, p. 10; 12-16; 34-37; 42). The actual facts of record fail to demonstrate that the police and Klusewitz took any action, beyond merely listening, that was designed to elicit incriminating remarks from Frederick. Petitioner cannot thereby demonstrate a violation of his right to counsel.

A state is not required to ignore all incriminating statements made by a defendant after he has been charged with a crime. They are simply not permitted to deliberately elicit such remarks outside the presence of counsel after his right to counsel has attached. The record here shows no attempt by the police to recruit Klusewitz as a police agent. Klusewitz contacted Holloway to advise him that he had information about the murder. Holloway never communicated with Klusewitz and asked him to get more information. Klusewitz was not paid nor did he receive any other consideration for his testimony. Trial counsel had no basis to file a suppression motion as to Klusewitz's testimony and he can not be found ineffective for failing to take a meritless action.

Even assuming for the sake of argument that at some point Klusewitz became a police agent, this agency could not have occurred before the police became aware of Klusewitz's conversation with Frederick. This record shows that the police were not aware of Klusewitz's actions until he contacted them and advised them that he had information about the murder. This

contact necessarily would have occurred after his first conversation with Frederick which is documented in the first note as April 10, 1975. Therefore, the first note and testimony regarding the April 10th conversation would have been admissible at the very least against Frederick.

Even if the subsequent notes were held inadmissible, any error in their admission at trial would have been harmless for two reasons. First, the notes and Klusewitz's testimony contain no confession by Frederick that he killed Doreme Kunkel. Even Frederick admitted at the PCRA hearing that Klusewitz's testimony did not hurt him that much, Secondly, the information contained in the notes is mainly cumulative of the testimony of Arlan Schaedler, which would have been admissible at trial. For these reasons, even if the notes after April 10th had been suppressed, there is not a reasonable probability that the result of the proceeding would have been different. Therefore, Frederick cannot show the prejudice required by the *Strickland* test with regard to the admission of Klusewitz's trial testimony. *Strickland v. Washington,* 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

SUMMARY OF ARGUMENT

Frederick has failed to show a violation of his Sixth Amendment right to effective assistance of counsel. The only fact which Frederick had alleged in his Writ of Habeas Corpus which, if proven, might have warranted relief was his claim that Klusewitz was recruited by Lieutenant Holloway in March, 1975, to obtain incriminating statements from Frederick after his right to counsel had attached with his arrest on the murder charge. That fact, however, was presented through Klusewitz's testimony and letters to the state post conviction court in a full evidentiary hearing. The state court found that evidence to be incredible. The Superior Court of Pennsylvania found on appeal that essential to Frederick's argument that counsel was ineffective for failing to move to

suppress Schaedler's and Klusewitz's testimony is the allegation that they were acting as police agents. Since that allegation was made out only if Klusewitz's testimony was believed, the finding by the PCRA court that Klusewitz's testimony was incredible rendered Frederick's claim meritless. The record supports both findings.

Since the finding of the PCRA court as to Klusewitz's credibility is entitled to a presumption of correctness under 28 U.S.C. § 2254(d), the District Court properly denied and dismissed Frederick's petition without an evidentiary hearing. Since the record clearly shows that the truth of his allegations were already determined, the Third Circuit Court of Appeals properly found no error in not affording Frederick a separate evidentiary hearing and in affirming the judgment of the district court because the record fails to show a constitutional violation.

The decision of the Third Circuit Court of Appeals is not in conflict with any decisions of this Court, other decisions of the Third Circuit Court or decisions of other Circuit Courts. The courts below have properly applied the law to the facts as they exist in the actual record. Frederick's argument necessarily require this Court to ignore or overturn the factual determinations made in the lower courts. Since those factual determinations are entitled to a presumption of correctness, Frederick's original petition failed to state a claim which warranted relief. *See Kuhlmann v. Wilson, supra.* Likewise, this petition fails to state a claim which warrants review and should be denied.

CONCLUSION

Accordingly, for all the foregoing reasons, petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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